IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

**No. 402**

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN, L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B. PETERS, AND MARC B. ROJTMAN,

*Petitioners,*

*vs.*

CARL H. BORAK, FOR AND ON BEHALF OF HIMSELF AND ALL OF THE OTHER COMMON STOCKHOLDERS OF J. I. CASE COMPANY WHO ARE SIMILARLY SITUATED TO HIM,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

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THE SOUTHWORTH-BARKER PRINTING COMPANY, CHICAGO 58

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## BRIEF FOR RESPONDENT IN OPPOSITION.

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### OPINIONS BELOW; JURISDICTION; STATUTES AND REGULATIONS INVOLVED.

The petition adequately states the opinions below, the jurisdictional requisites and the statutes involved.

### QUESTION PRESENTED.

The complaint charges that a corporate merger with adverse consequences to plaintiff and other shareholders gained shareholder approval because of a proxy statement which contained false and misleading statements and omissions in violation of Sec. 14(a) of the Securities Exchange Act of 1934 (the "Act"). Diversity jurisdiction also exists.

May a federal court, under section 27 of the Act, in an individual non-derivative action, grant complete relief, including damages or rescission?

The Court of Appeals for the Seventh Circuit answered the question "yes". We believe its answer was plainly correct.

## STATEMENT.

The facts and proceedings below are stated by the Court of Appeals (Pet. 16-24).

In essence the complaint charges a deprivation of preemptive rights of plaintiff and other shareholders, the result of a merger approved by means of a false and misleading proxy statement and in consequence of illegal and fraudulent conduct on the part of directors and others. Count 1, based on diversity jurisdiction, claims breach of the directors' fiduciary duty to the shareholders. Count 2, based on diversity and federal question jurisdiction, claims that shareholders' rights were violated by the approval of the merger through a false and misleading proxy statement which violated section 14(a) of the Act.

The district court held applicable to both counts a Wisconsin statute requiring security for expenses in derivative actions. The court further held that as to count 2 it could grant only declaratory relief.

The Court of Appeals held that the complaint stated individual, non-derivative claims and that the state security for expense statute was not applicable to either count. The Court of Appeals also held as to count 2 that federal courts have jurisdiction under section 27 of the Act to grant complete retrospective relief, not merely piecemeal, declaratory relief to remedy violations of section 14(a) of the Act.

The petition for certiorari is limited to the scope of relief available under count 2. Thus petitioners' "question pre-

sented'' (Pet. 2) questions only whether there is jurisdiction to grant ''rescission or damages''. It assumes there is jurisdiction to grant declaratory relief.

While criticizing the decision below, petitioners do not ask that certiorari be granted to determine the correctness of the holding that count 1 asserts individual, non-derivative claims to which the state statute is inapplicable.

## ARGUMENT.

The petition for a writ of certiorari should be denied: there is no direct conflict of decisions and the decision below is plainly correct.

1. Contrary to petitioners' assertion (Pet. 8-11), there is no conflict between the Courts of Appeals for the Second, Sixth and Seventh Circuits. In *Dann* v. *Studebaker-Packard Corp.*, 288 F. 2d 201 (C.A. 6, 1961) the court held that individual shareholders have an implied right of action under § 14(a) of the Securities Exchange Act of 1934 and reversed an order dismissing the complaint for failure to state a claim. The opinion below holds that an implied individual right of action exists under § 14(a) and is therefore wholly consonant with the holding of the *Dann* case.[1]

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1. Indeed, the decision below and in the *Dann* case is in complete harmony with a long line of cases holding directly or by implication that a private right of action flows from a violation of section 14(a) of the Securities Exchange Act of 1934. *Central Foundry Co.* v. *Gondelman*, 166 F. Supp. 429 (S. D. N. Y. 1958); *Rosen* v. *Allegheny Corp.*, 133 F. Supp. 858 (S. D. N. Y. 1955); *Horwitz* v. *Balaban*, 112 F. Supp. 99 (S. D. N. Y. 1949); *Tate* v. *Sonotone*, 5 S. E. C. Jud. Dec. 310 (S. D. N. Y. 1947). See also *Mack* v. *Mishkin*, 172 F. Supp. 885 (S. D. N. Y., 1959); *Textron* v. *American Woolen Co.*, 122 F. Supp. 305 (D. Mass., 1954); and compare *Brown* v. *Bullock*, 194 F. Supp. 207, 231 (S. D. N. Y.) aff'd. other grounds, 294 F. 2d 415 (C. A. 2, 1961). This view, in turn, stems from a longer line of cases establishing an implied private right of action under other provisions of the federal securities laws. See, e.g. *McClure* v. *Borne Chemical Co.*, 292 F. 2d 824 (C. A. 3, 1961), cert. denied 368 U. S. 939 (1962); *Kardon* v. *National Gypsum Co.*, 69 F. Supp 512 (E. D. Pa. 1946), 73 F. Supp. 798 (1947); *Geismar* v. *Bond & Goodwin, Inc.*, 40 F. Supp. 876 (S. D. N. Y. 1941); *Errion* v. *Connell*, 236 F. 2d 447 (C. A. 9, 1956); and see North, Implied Liability Cases Under the Federal Securities Laws, 4 Corp. Prac. Comm. 1 (1962).

The holding of the *Dann* case and that of the court below that section 14(a) creates an implied right of action for individual shareholders in their own right is not in conflict with *Howard* v. *Furst*, 238 F. 2d 790 (C.A. 2, 1956), cert. denied, 353 U. S. 937 (1957). In *Furst* the action was brought by a shareholder derivatively—*i.e.*, in the right of the corporation (238 F. 2d at 791). The court held only that a derivative action would not lie under section 14(a). It expressly avoided ruling on the right of individual stockholders to sue in their own right, stating: "* * * we leave that question open * * *" (238 F. 2d at 793). Petitioners' paraphrasing of the *Furst* case (Pet. 9) omits stating that the court was concerned only with the question whether § 14(a) created any rights for the benefit of the corporation (238 F. 2d at 793).[2]

In contrast, the court below (Pet. App. 27, 33) and the court in the *Dann* case (288 F. 2d at 208, 210-11) were concerned with actions brought by shareholders in their own behalf to protect their right—not the corporations'—to a full and fair disclosure of all material facts in proxy statements. Hence there is no conflict in any of the decisions.

2. Contrary to petitioners' assertion (Pet. 11-13), there is no direct conflict between the decision below and the *Dann* case regarding the scope of relief under section 14(a).

(a) The *Dann* case arose on a motion to dismiss the complaint. The only issue before the Court of Appeals for the Sixth Circuit was whether the complaint stated a claim

2. Even if *Furst* were relevant and created an apparent conflict that decision will fall of its own weight without review by this Court. That case has been questioned by other courts which have refused to follow or extend it. Judge Clark of the Court of Appeals for the Second Circuit recently stated: "* * * I suspect that someday we shall have to disavow the much criticized case of *Howard* v. *Furst* * * *". *Brown* v. *Bullock*, 294 F. 2d 415, 422 (C. A. 2, 1961) (concurring opinion). See also *Brown* v. *Bullock*, 194 F. Supp. 207, 232-234 (S. D. N. Y. 1961); and *Hooper* v. *Mountain State Securities Corp.*, 282 F. 2d 195, 203 (C. A. 5, 1960), cert. denied, 365 U. S. 814.

to any relief. Since the court held a claim was stated for declaratory relief it was unnecessary to a decision on the motion to discuss the availability of other forms of relief and at the most this discussion was *obiter dictum*.

(b) The court in the *Dann* case reached its conclusion regarding the scope of relief on the basis of lack of diversity jurisdiction. (288 F. 2d at 204, 212, 215.) Here diversity is present.

We do not believe that this court need be concerned with reviewing such *dictum*, especially where it has not persuaded or misled any court of appeals, the Securities and Exchange Commission, or any legal text writer.[3]

The Securities and Exchange Commission, the agency charged by law with the administration of the relevant federal statutes, filed "an exhaustive brief" below as *amicus curiae* (Pet. App. 27, n. 9) in which it took the position that: (1) a private right of action in shareholders is well established under §§14(a) and 27 of the Securities Exchange Act of 1934 and (2) in such actions federal courts have power to grant full relief including damages or rescission.

So far as we know, no court has been concerned with or applied the *dictum* of the *Dann* case regarding scope of relief except the district court which was reversed by the Court of Appeals below. The decision of the Court of Appeals below that the general grant of jurisdiction to enforce the statute vests the court with power "to award damages or such other retrospective relief . . . as the . . . controversy may require" (Pet. App. 35) is wholly con-

3. Every legal commentary that we have been able to find has criticized the *dictum* of the *Dann* case. See Loss, Securities Regulation (2d ed., 1961), pp. 2029-2032; and also the following notes and comments: 75 Harv. L. Rev. 637 (1962); 62 Columbia L. Rev. 375 (1962); 7 Villanova L. Rev. 125 (1961); 9 U. C. L. A. Law Rev. 232 (1962); 3 Boston College Ind. and Comm. L. Rev. 58 (1961); and 1962 Duke L. J. 151.

sistent with the numerous cases holding that retrospective relief is available in implied liability actions under other sections of the federal securities acts. See, *e.g.*, *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195 (C.A. 5, 1960), cert. denied 365 U. S. 814; *Fratt* v. *Robinson*, 203 F. 2d 627 (C.A. 9, 1953); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (C.A. 2, 1951); *Goldstein* v. *Groesbeck*, 142 F. 2d 422, 426, 427 (C.A. 2, 1944) cert. denied 323 U. S. 737; and *Geismar* v. *Bond and Goodwin, Inc.*, 40 F. Supp. 876, 878 (S.D.N.Y. 1941).

All of these cases, other than the *Dann dictum*, are descendants of the numerous decisions of this Court holding that "federal courts have the power, under a general grant of jurisdiction to enforce a federal statute, to grant all of the relief which may be commensurate with the effective enforcement of the statute and the protection of rights created thereby, notwithstanding the failure of the statute to specify the remedies which may be employed" (Pet. App. 33). See, *e.g.*, *Bell* v. *Hood*, 327 U. S. 678, 684 (1946); *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 288 (1940); *Sola Electric Company* v. *Jefferson Electric Company*, 317 U. S. 173, 176 (1942); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110, 128 (1948); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 291 (1960).

We think that in the future if the issue of the scope of relief is squarely raised again lower courts will follow the holding below, not the *dictum* in *Dann*. If we are proved wrong, this Court may at that time exercise its discretionary power of review. As of now the question is not ripe for review.

## CONCLUSION.

The opinion below is not in conflict with any other decision and is manifestly correct. Accordingly, respondent respectfully submits that the petition for a Writ of Certiorari should be denied.

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